

NOV 15 1950

**CHARLES ELMORE CROPLEY
CLERK**

**IN THE
Supreme Court of the United States
OCTOBER TERM, 1950.
No. 77.**

MONTANA-DAKOTA UTILITIES CO.,
Petitioner,

v.

NORTHWESTERN PUBLIC SERVICE COMPANY,
Respondent.

**ON WRIT OF CERTIORARI TO THE UNITED STATES COURT
OF APPEALS FOR THE EIGHTH CIRCUIT.**

BRIEF FOR PETITIONER.

**WILLIAM D. MITCHELL,
JOHN C. BENSON,
H. F. FELLOWS,**
Counsel for Petitioner.

**PAT MORRISON,
PAEGRE & BENSON,
RODGER L. NORDBYE,**
Of Counsel.

INDEX.

PAGE

Opinions Below	1
Jurisdiction	1
Questions Presented	2
The Statutes	4
Specification of Errors	10
Statement	11
Summary of Argument	14
Argument:	
I. General statutes defining the jurisdiction of District Courts vest in them jurisdiction of a case like this, which arises under a law of the United States, and since the Power Act does not give the Commission authority to pass upon the reasonableness of past charges, it does not withdraw from the courts jurisdiction in cases involving the reasonableness of rates collected in the past	17
II. There is no basis here for applying the rule that administrative remedies must be exhausted before resorting to the courts	21
III. The opinion of the Court below	23
IV. Where there is a right, there should be a remedy	28
Conclusion	29
Appendix	31

CITATIONS.

PAGE

Cases:

<i>Cleveland and Akron v. Hope Natural Gas Co.</i> , 44 P. U. R. (N. S.) 1	24, 31-32
<i>Federal Power Commission v. Hope Natural Gas Co.</i> , 320 U. S. 591	28, 32-33
<i>Hope Natural Gas Co. v. Federal Power Commission</i> , 134 F. (2d) 287	26, 27, 28
<i>Kardon v. National Gypsum Co.</i> , 69 F. Supp. 512...	18
<i>Mississippi Power and Light Co. v. Memphis Natural Gas Co.</i> , 162 F. (2d) 388	22
<i>Remar v. Clayton Securities Corporation</i> , 81 F. Supp. 1014	18
<i>Texas & Pacific Railway Co. v. Rigsby</i> , 241 U. S. 33.	29

Statutes:

United States Code, Title 28, § 41 (now Title 28, United States Code, Sections 1331, 1337)	4, 17
Federal Power Act, August 26, 1935 (16 U. S. C. A., §824, <i>et seq.</i>):	
Sec. 824, subchapter II (b)	5
824(d)	5, 17
824d(a)	6, 24
(b)	6
(c)	6
(d)	6-7, 18
(e)	7-8, 18, 19, 25
824e	15, 18
824e(a)	8-9, 25
(b)	9, 16, 20, 22, 25
825p	1-2, 4-5, 17

IN THE
Supreme Court of the United States
OCTOBER TERM, 1950.

No. 77.

MONTANA-DAKOTA UTILITIES Co.,
Petitioner,

v.

NORTHWESTERN PUBLIC SERVICE COMPANY,
Respondent.

**ON WRIT OF CERTIORARI TO THE UNITED STATES COURT
OF APPEALS FOR THE EIGHTH CIRCUIT.**

BRIEF FOR PETITIONER.

Opinions Below.

The opinion of the District Court (R., Vol. I, p. 112) denying motion to dismiss for want of jurisdiction is reported in 73 Fed. Supp. 149. Its opinion on the merits (R., Vol. V, p. 1883) is not reported.

The opinion of the Court of Appeals (R., Vol. VI, p. 1988) is reported in 181 F. (2d) 19.

Jurisdiction.

The judgment of the Court of Appeals was entered April 4, 1950 (R., Vol. VI, p. 1996). The petition for certiorari was filed May 17, 1950.

Jurisdiction rests on Title 28, United States Code, Section 1254. See also Section 825p of the Power Act

which, after making "exclusive" the jurisdiction of United States District Courts over "all suits in equity and actions at law brought to enforce any liability or duty created by * * * this chapter", provides that such judgments of the District Courts shall be subject to review by appeal to the Courts of Appeals, and by certiorari in this Court "as provided in Sections 225 and 347 of Title 28", now Sections 1291 and 1254 of Title 28, U. S. C.

Questions Presented.

No question involving the merits is presented. The only question is one of the jurisdiction of the District Court.

The action is one arising under, and involving the interpretation of, the Power Act which gave the Federal Power Commission authority to regulate transmission and sale of electric energy in interstate commerce at wholesale, and the only question is whether that act gives the Commission either "primary" or exclusive power to determine the reasonableness of *past* charges and rates for sale of electric energy.

The action was begun in the United States District Court for South Dakota by petitioner to recover for alleged unreasonably low rates previously paid to and unreasonably high charges collected from petitioner's predecessors in interest, by the respondent. The District Court held it had jurisdiction and granted judgment for the petitioner. The Court of Appeals reversed and ordered the dismissal of the case, holding that the District Court lacked "jurisdiction" to determine the reasonableness of the rates, as the Commission had exclusive power to consider and

decide all questions as to reasonableness, and on the same theory the Court of Appeals held that the petitioner had not exhausted its administrative remedies before resorting to the courts.

The petitioner contends that under the Power Act the power of the Commission over rates is purely legislative and *is limited to establishing rates for the future*, and it has no power to grant reparations or to pass on the reasonableness of past charges as an "aid" to the courts; that the petitioner had no remedy before the Commission, and that the statutory jurisdiction of District Courts to entertain cases arising under Acts of Congress was not limited by any provision in the Power Act vesting primary or exclusive jurisdiction in the Power Commission to determine the reasonableness of charges in the past.

The questions may be stated thus:

1. Has the Federal Power Commission primary, or indeed any, jurisdiction to consider and determine the reasonableness of rates exacted and collected in the past, or do more than exercise the legislative power to fix rates for the future?

2. Had the plaintiff any administrative remedy before the Commission? Has the Commission any authority to consider a complaint as to the reasonableness of past rates, or to grant reparations, or even to make findings as to past charges as an aid to the courts in which a claim for reparations is made?

The Statutes.

Title 28, § 41, U. S. C. (now Title 28, United States Code Sections 1331, 1337), defining the jurisdiction of the United States District Courts, provided:

"The district courts shall have original jurisdiction as follows: * * *

First. Of all suits of a civil nature, at common law or in equity, * * * where the matter in controversy exceeds, exclusive of interest and costs, the sum or value of \$3,000, and (a) arises under the Constitution or laws of the United States. * * *

* * * * *

Eighth. Of all suits and proceedings arising under any law regulating commerce."

Section 825p of the Power Act is as follows:

"*Sec. 825p Jurisdiction of offenses; enforcement of liabilities and duties.*—The District Courts of the United States, the District Court of the United States for the District of Columbia, and the United States courts of any Territory or other place subject to the jurisdiction of the United States shall have *exclusive* jurisdiction of violations of this chapter or the rules, regulations, and orders thereunder, *and of all suits in equity and actions at law brought to enforce any liability or duty created by, or to enjoin any violation of, this chapter or any rule, regulation, or order thereunder.* Any criminal proceeding shall be brought in the district wherein any act or transaction constituting the violation occurred. Any suit or action to enforce any liability or duty

created by, or to enjoin any violation of, this chapter or any rule, regulation, or order thereunder may be brought in any such district or in the district wherein the defendant is an inhabitant, and process in such cases may be served wherever the defendant may be found. Judgments and decrees so rendered shall be subject to review as provided in sections 225 and 347 of Title 28. No costs shall be assessed against the Commission in any judicial proceeding by or against the Commission under this chapter. (June 10, 1920, c. 285, § 317, as added Aug. 26, 1935, c. 687, Title II, § 213, 49 Stat. 862, amended June 25, 1936, c. 804, 49 Stat. 1921.)"

This section seems to confirm jurisdiction of cases like this to the United States District Courts, to the exclusion of state courts, leaving Commission *orders* to be taken direct to the Courts of Appeals for review.

The pertinent part of the Federal Power Act is subchapter II which became effective August 26, 1935 (16 U. S. C. A. § 824, *et seq.*). Section 824(b) is as follows:

"The provisions of sections 824-824h of this title shall apply to the transmission of electric energy in interstate commerce and to the sale of electric energy at wholesale in interstate commerce, but shall not apply to any other sale of electric energy" etc.

Section 824(d) reads:

"The term 'sale of electric energy at wholesale' when used in sections 824-824h of this title means a sale of electric energy to any person for resale."

ection 824d is as follows:

“Sec. 824d Rates and charges; schedules; suspension of new rates.—(a) All rates and charges made, demanded, or received by any public utility for or in connection with the transmission or sale of electric energy subject to the jurisdiction of the Commission, and all rules and regulations affecting or pertaining to such rates or charges shall be just and reasonable, and any such rate or charge that is not just and reasonable is hereby declared to be unlawful.

(b) No public utility shall, with respect to any transmission or sale subject to the jurisdiction of the Commission, (1) make or grant any undue preference or advantage to any person or subject any person to any undue prejudice or disadvantage, or (2) maintain any unreasonable difference in rates, charges, service, facilities, or in any other respect, either as between localities or as between classes of service.

(c) Under such rules and regulations as the Commission may prescribe, every public utility shall file with the Commission, within such time and in such form as the Commission may designate, and shall keep open in convenient form and place for public inspection schedules showing all rates and charges for any transmission or sale subject to the jurisdiction of the Commission, and the classifications, practices, and regulations affecting such rates and charges, together with all contracts which in any manner affect or relate to such rates, charges, classifications and services.

(d) Unless the Commission otherwise orders, no change shall be made by any public utility in

any such rate, charge, classification, or service, or in any rule, regulation, or contract relating thereto, *except after thirty days' notice to the Commission and to the public.* Such notice shall be given by filing with the Commission and keeping open for public inspection new schedules stating plainly the change or changes to be made in the schedule or schedules then in force and the time when the change or changes will go into effect. The Commission, for good cause shown, may allow changes to take effect without requiring the thirty days' notice herein provided for by an order specifying the changes so to be made and the time when they shall take effect and the manner in which they shall be filed and published.

(e) Whenever any such new schedule is filed the Commission shall have authority, either upon complaint or upon its own initiative without complaint, at once, and, if it so orders, without answer or formal pleading by the public utility, but upon reasonable notice, to enter upon a hearing concerning the lawfulness of such rate, charge, classification, or service; and, pending such hearing and the decision thereon, the Commission, upon filing with such schedules and delivering to the public utility affected thereby a statement in writing of its reasons for such suspension, may suspend the operation of such schedule and defer the use of such rate, charge, classification, or service, but not for a longer period than five months beyond the time when it would otherwise go into effect; and after full hearings, either completed before or after the rate, charge, classification, or service goes into effect, the Commission may make such orders with reference thereto as would be

proper in a proceeding initiated after it had become effective. If the proceeding has not been concluded and an order made at the expiration of such five months, the proposed change of rate, charge, classification, or service shall go into effect at the end of such period, but in case of a proposed increased rate or charge, the Commission may by order require the interested public utility or public utilities to keep accurate account in detail of all amounts received by reason of such increase, specifying by whom and in whose behalf such amounts are paid, and upon completion of the hearing and decision *may by further order require such public utility or public utilities to refund, with interest, to the persons in whose behalf such amounts were paid, such portion of such increased rates or charges as by its decision shall be found not justified.* At any hearing involving a rate or charge sought to be increased, the burden of proof to show that the increased rate or charge is just and reasonable shall be upon the public utility, and the Commission shall give to the hearing and decision of such questions preference over other questions pending before it and decide the same as speedily as possible. (June 10, 1920, c. 285, § 205, as added Aug. 26, 1935, c. 687, Title II, § 213, 49 Stat. 851.)"

Section 824e is as follows:

"Sec. 824e Power of Commission to fix rates and charges; determination of cost of production or transmission.—(a) Whenever the Commission, after a hearing had upon its own motion or upon complaint, shall find that any rate, charge or classification, demanded, observed, charged, or collected by any public utility for any transmission

or sale subject to the jurisdiction of the Commission, or that any rule, regulation, practice, or contract affecting such rate, charge or classification *is unjust, unreasonable, unduly discriminatory or preferential*, the Commission shall determine the just and reasonable rate, charge, classification, rule, regulation, practice, or contract *to be thereafter observed and in force, and shall fix the same by order.*

(b) The Commission upon its own motion, or upon the request of any State commission whenever it can do so without prejudice to the efficient and proper conduct of its affairs, may investigate and determine the cost of the production or transmission of electric energy by means of facilities under the jurisdiction of the Commission in cases where the Commission has no authority to establish a rate governing the sale of such energy. (June 10, 1920, c. 285, § 206, as added Aug. 26, 1935, c. 687, Title II, § 213, 49 Stat. 852.)" [All italics supplied.]

It should be noted that when the bill for subchapter II of the Power Act was pending in the Congress it contained provisions (similar to those in the Acts applicable to the Interstate Commerce Commission) authorizing the Power Commission to consider the reasonableness of past rates and to make reparation orders. Those provisions were stricken out in committee.

Specification of Errors.

The Court below erred:

1. In holding that the District Court was without jurisdiction;

2. In holding that the Power Act gives jurisdiction to the Power Commission to determine the reasonableness of past rates and charges and denies to the District Court jurisdiction to entertain this action, in which a determination of the reasonableness of past rates is necessary to the granting of relief;

3. In applying to the facts of this case the rule that judicial relief may not be obtained until the prescribed administrative remedies have been exhausted;

4. In holding that any administrative remedy was available to the petitioner, and in ignoring the allegations of the complaint and the findings of the Trial Court that the petitioner's predecessors were from 1935 to 1945 under the domination of the defendant and therefore unable to resort to the Commission before the rates became effective, to prevent their taking effect, or to resort to the Commission for relief during that period;

5. In holding, in effect, that the petitioner can have no relief in any tribunal since the Commission may only exercise the legislative power to fix future rates, and the courts are without jurisdiction because they are forbidden by the Power Act to consider or determine the reasonableness of past rates although that is a judicial question.

Statement.

This action was commenced February 3, 1947 (R. Vol. I, p. 1) in the United States District Court for South Dakota by petitioner, Montana-Dakota Utilities Co. against the respondent, Northwestern Public Service Company, to recover because of unreasonably low rates paid by defendant for electric energy delivered to it by plaintiff's predecessor corporations, and for unreasonably high charges exacted by defendant for services it rendered to plaintiff's predecessors during the period from September 1, 1935, to October 11, 1945. That period was chosen because on August 26, 1935, was enacted the statute giving the Federal Power Commission jurisdiction to regulate charges for transmission and sale of electric energy at wholesale in interstate commerce, and which statute provided that "all rates and charges made, demanded, or received by any public utility for or in connection with the transmission or sale of electric energy subject to the jurisdiction of the Commission, * * * shall be just and reasonable, and any such rate or charge that is not just and reasonable is hereby declared to be unlawful."

The end of the period was fixed as October 19, 1945, because on October 19, 1945, through change of ownership and management the dominion and control over plaintiff's predecessors previously exercised by respondent came to an end and the claims here involved were then acquired by petitioner.

Petitioner's predecessors were Northern Power and Light Company, North Dakota Power and Light Company, and Dakota Public Service Company. On July 1, 1939, "Northern" and "North Dakota"

merged to form Dakota Public Service Company, and on October 19, 1945, all of the stock of Dakota Public Service Company was purchased by petitioner, and on the same day "Dakota" assigned all its claims, property and assets to petitioner (R., Vol. I, pp. 237-9). Originally, petitioner's predecessors and the respondent were part of a complicated public utility holding system controlled by the same "parent" company, and through common directors and officers the respondent dominated plaintiff's predecessors. The chain was broken in 1932 by a receivership and a bankruptcy proceeding, but the complaint alleged and the District Court found that the domination and control by respondent through common directors and officers continued right down to October 19, 1945, when the petitioner stepped into the picture. The arrangements for the necessary physical connections between petitioner's predecessors and the respondent were put in the form of contracts between them, and after the passage of the act giving the Power Commission jurisdiction over wholesale transmission and sale, compliance with statutory requirement for filing schedules of rates and charges took the form of filing with the Commission those contracts.

Shortly after petitioner acquired the property of its predecessors and on February 27 and 28, 1946 (R., Vol. I, pp. 159, 263) it served notice of cancellation of the existing contracts, and on August 12, 1946, filed a complaint with the Power Commission alleging the existing rates to be unreasonable and asked the Commission to fix new rates *for the future* (R., Vol. I, p. 149). This complaint never came to a hearing because new rates acceptable to the petitioner were agreed upon and the Commis-

sion then dismissed the complaint as moot (R., Vol. V, p. 1876), saying:

"(e) By the terms of the agreement filed August 20, 1947, the issues involved in the complaint, as amended, have become merely moot and the public interest will be served by dismissing the same."

The petitioner did not then or since ask the Commission for any relief or action as to the unreasonable rates and charges in force from 1935 to 1945. The Commission had already conceded it had no power to grant reparations, and there was no provision in the act allowing the Commission to make findings as to the reasonableness of past rates as an "aid" to the courts. It seemed the proper course for the petitioner was to begin this action.

The complaint in the case alleged that "the action arises under the Federal Power Act, as hereinafter more fully appears, and under a law of the United States regulating commerce under said Federal Power Act" (R., Vol. I, p. 2). The complaint also alleged that the rates and charges during the period from 1935 to 1945 were "unreasonable" and were forced upon the plaintiff's predecessors by respondent by fraudulent practice and by means of its domination through common directors and officers, and the Trial Court so found (R., Vol. V, pp. 1930-1965). Thrice the respondent raised the point that as granting relief required a determination of the reasonableness of the rates charged the District Court was without jurisdiction, as the Power Commission had exclusive authority to deal with that question. The point was first raised by motion to dismiss (R., Vol. I, p. 106), which the Trial Court denied (R., Vol.

I, p. 112). It was raised again by motion to dismiss at the close of the plaintiff's evidence, which was denied (R., Vol. III, pp. 986-996) and it was raised again on the final submission of the case and again rejected (R., Vol. V, p. 1883).

The District Court made findings of fact (R., Vol. V, p. 1930) and conclusions of law (R., Vol. V, p. 1960) in which it determined that the rates which had been charged during the ten year period were unreasonable and unlawful, and had been wrongfully imposed on the petitioner by respondent through its dominion over and control of plaintiff's predecessors. Judgment was rendered for the petitioner in the sum of \$779,958.30 (R., Vol. V, p. 1965). The respondent appealed to the United States Court of Appeals which reversed the judgment and ordered the case dismissed, on the ground that the District Court was without "jurisdiction" because the Power Commission had exclusive jurisdiction to pass on the reasonableness of the rates charged, and on the further ground that the petitioner had not exhausted its administrative remedies by applying to the Power Commission for relief.

Summary of Argument.

This action arises under the Federal Power Act, and particularly the provision which declares that all rates and charges which are unjust or unreasonable are unlawful. The sections of the Judicial Code which define the jurisdiction of District Courts and vest in them jurisdiction in actions arising under the laws of the United States and those arising under any act regulating commerce, vest jurisdiction of the controversy in the District Court.

The question is not whether the Federal Power Act gives, but whether it deprives the courts of, jurisdiction otherwise vested in them by the Judicial Code.

An issue of fact in the case, the determination of which was necessary to the rendition of judgment on the merits, is whether rates and charges for electricity paid by or charged and collected in the past by the respondent were unjust and unreasonable. The question is whether the Power Act gives "primary" or exclusive authority to the Power Commission to consider and decide that question, and thus deprives the District Courts of jurisdiction they otherwise would have.

Under the Power Act the Commission has no power to order reparations for past unreasonable charges. That power was deliberately withheld by the Congress. One section of the Act applicable to cases where the rates complained of have been in effect [Section 824e], gives the Commission authority to consider those rates, and if found to be unreasonable, to fix rates for the future. Another section [824d(e)] provides that when a new schedule is filed, and before it takes effect, the Commission may consider the proposed rates and if found to be unreasonable disapprove the schedule. The only authority for the Commission to order refunds is in the second class of cases, and the power is limited to ordering refunds of charges collected during the pendency of the proceeding.

Thus, the Commission was not given authority, after rates have gone into effect, to consider the reasonableness of past charges and order reparations. Neither was the Commission given power, in anticipation of judicial proceedings or during their pendency, to make any finding as an "aid" to the courts on the

question of reasonableness of past rates. The only authority to make findings "in aid" of another tribunal is in Section 824e(b), which gives limited power to make findings as to cost of production or transmission of electricity as an aid to State commissions.

There is no basis for the view that authority to determine the reasonableness of past charges and allow recovery of excessive exactions is vested in the Commission and therefore withdrawn from the courts.

This is not a case for application of the rule that administrative remedies must be exhausted before resort to the courts. The complaint alleged and the Trial Court found that the petitioner's predecessors in interest were, during the period involved in the case, under the domination and control of the respondent through common directors and officers, and it appears that no resort to the Commission could have been had to prevent the unreasonable rates from taking effect, nor to obtain reasonable rates for the future until, by change of control and management, the petitioner, as a free agent, was in a position to do so.

The petitioner in 1946 did promptly apply to the Commission to fix new rates for the future, and that resulted in an agreement between the parties as to future rates which obviated a hearing by the Commission, but as the Power Act does not authorize the Commission to determine the reasonableness of past charges, either as a basis for a reparation order or as an aid to a court in an action to recover unreasonable exactions, the petitioner's only recourse was to the courts.

The decision of the Court below would leave the petitioner without a remedy.

ARGUMENT.

I.

General statutes defining the jurisdiction of District Courts vest in them jurisdiction of a case like this, which arises under a law of the United States, and since the Power Act does not give the Commission authority to pass upon the reasonableness of past charges, it does not withdraw from the courts jurisdiction in cases involving the reasonableness of rates collected in the past.

The question is not whether the Power Act grants to the District Court jurisdiction to entertain cases involving the reasonableness of past charges, but whether that act deprives the courts of jurisdiction they otherwise would have.

This action arises under a law of the United States and one "regulating commerce." The basis for recovery is that provision of Sec. 824d (p. 6 above) of the Power Act which provides that a "rate or charge that is not just and reasonable is hereby declared to be unlawful." §41 of Title 28, U. S. C. (now Sections 1331, 1337 U. S. C.) gave to the District Court jurisdiction, which seems to have been made "exclusive" of state courts by Sec. 825p of the Power Act (p. 4 above). The latter section is not by its terms limited to actions brought by the Commission, but a decision of that question is not necessary in this case as the provisions of the Judicial Code defining jurisdiction of the District Courts are enough. A similar question has arisen under the Se-